REMARKS

General remarks.

Claims 21, 22, 24, and 25 are all the claims pending in the application.

All the claims stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Forward in view of Good.

Remarks concerning the first declaration

Applicant submitted a first declaration under 37 C.F.R. § 1.131, together with Evidentiary Exhibits 1-50, to show that the rejection over Forward in view of Good should be withdrawn since Forward is non-analogous art. More particularly, Applicant pointed out that Forward relates to real estate sales whereas Good relates to real estate rentals. Applicant pointed out that the real estate sales market and the real estate rental market are dissimilar, having only in common that both markets involve land. Applicant pointed out that a substantial weight of evidence shows that real estate sales is not considered by the artisan of ordinary skill to be related to real estate rentals. Applicant submitted the evidence, together with particularized testimony and explanation, in the first declaration under 37 C.F.R. § 1.131. Applicant's showing of proof was clear and well-supported by the evidence, and yet the Examiner indicated that the evidence was found to be unpersuasive.

The Examiner stated in the Office Action that *only certain ones* of the exhibits were considered, namely, those published prior to Applicant's filing date. Applicant respectfully notes that this failure to consider all of the evidentiary exhibits constitutes legal error. The evidentiary exhibits were not offered to prove prior invention by Applicant, but to establish *a factual point about the state of the real estate sales and the real estate rental markets* -- a point that was true prior to Applicant's invention, is true during the pendency of the present application, and will be true in the future. The evidentiary showing proves an empirical fact, and there is no legal basis at all for the Examiner to ignore the proffered evidence published after the filing date of the application.

To help the Examiner understand why reconsideration is essential in this regard, Applicant provides a brief analogy to another situation in which evidence later than a filing date must be considered. To wit, secondary factors of non-obviousness must always be considered

regardless of the date of the evidence. When an Applicant is attempting to show non-obviousness through market success, is Applicant limited to sales that occurred prior to the filing date of the application? The answer certainly is that the fact of market success can and must be established by evidence that is later than the filing date. Other such analogies are possible, but Applicant respectfully submits that this discussion taken with that above should be enough to help the Examiner recognize the legal error in ignoring a majority of Applicant's evidence submitted with the first declaration.

The Examiner is respectfully invited to revisit the evidence supplied with the first declaration (namely, Evidentiary Exhibits 1-50), and to reconsider the prior art rejection in the light thereof.

Another error in the line of reasoning set forth by the Examiner is the stated position that the evidence supports the Examiner's position. That is to say, the Examiner has stated that because many articles mention both real estate sales and real estate rentals, it must mean that the two are analogous. Applicant respectfully submits that such a position is ill-founded: the mere mention of two opposite entities in the same article does not make them analogous within the meaning of the patent law.

Another analogy might be helpful. Plato discussed the physical world in terms of four elements: earth, air, fire, and water. Plato's discourses on the nature of the physical world thus would serve as a foundation, under the Examiner's stated reasoning, for the position that earth and air are analogous art, that fire and water are analogous art, that everything in the physical world is analogous art simply because of being mentioned in the same article. The fact of a common mention in literature thus makes all four "elements" analogous in the eyes of the artisan of ordinary skill of long ago.

In fact, there is some commonality in that all four elements are elements, but beyond that there is no support for a more particularized finding that all four are analogous to each other. Actually, the context of Plato's discourses makes it clear that the four elements are intended to be and are thought of as "different" entities.

It is the same point with real estate sales and real estate rentals. They have in common land, and people who are involved (since everyone has to exist somewhere), but nothing further.

The Examiner's discussion of Evidentiary Exhibit 18 concludes that real estate sales and real estate rentals are the same because sites link to each other. Logically, then, Google, the USPTO website, and various vulgar sites of low reputation are all analogous because Google links them together. Law firms linking to the USPTO site are thus analogs to the USPTO even though the world of the patent lawyer is vastly different, and on the opposite side of the world of the patent examiner.

The Examiner's discussion of Evidentiary Exhibit 19 concludes that because a single customer chooses between real estate rental and real estate sales, the two are analogous. Further, the Examiner concludes that there is a common customer base. It is true that only adults buy and sell real estate, but this is not enough to make the two disparate markets become analogs. Under this reasoning, each and every market is analogous to every other market. It is respectfully submitted that the need for a single customer to be choosing between the two weighs far more heavily toward Applicant's position than the Examiner's.

With respect to the Examiner's discussion of Evidentiary Exhibit 20, no more is stated by the Examiner than the fact that both involve real estate. In *Graver Tank*, the Examiner will recall, the claimed invention and the cited non-analogous art both involved removing oil from underground, but the art was held to be non-analogous art by the U.S. Supreme Court. Does the reasoning in that famous case guide a conclusion different than that reached by the Examiner?

With respect to the Examiner's discussion of Evidentiary Exhibit 35, Applicant notes the word "instead" -- home owners electing to rent their homes instead of selling them supports the Examiner's position not in the least.

Applicant respectfully points out for the evidentiary record that the reasoning set forth by the Examiner in the Office Action ignores the specific facts set out in the evidence, facts that establish difference in the two fields of endeavor, in favor of an unacceptably big-picture view that sees only the similarities of land and humans being involved in both disparate fields. The Examiner's position constitutes legal error, ignores more facts than it considers, and fails to give the evidence the weight it deserves.

For these reasons, it is respectfully submitted that Applicant has sufficiently carried the burden of providing proof that Forward constitutes non-analogous art, which necessitates a conclusion that the rejection of the pending claims under 35 U.S.C. § 103(a) is an obviousness

rejection based on non-analogous art. Since the rejection is based on non-analogous art, the rejection is respectfully submitted to be invalid and moot.

Remarks concerning the second declaration

To ensure that sufficient evidence is before the Examiner, and to guard against the possibility that the Examiner will consider only evidence published prior to Applicant's filing date, Applicant files herewith a second declaration under 37 C.F.R. § 1.131. The paragraph numbering in the second declaration continues with numbers that follow in sequence after those provided in the first declaration, for the sake of clarity of reference in the future.

Enclosed with the second declaration are Evidentiary Exhibits 51-212, all of which were to the best knowledge of the undersigned after reasonable inquiry, published prior to the filing date of the present application, and most of which were published prior to the earliest effective filing date of the present application. The second declaration provides particularized testimony with respect to each evidentiary exhibit, as required.

The second declaration and its exhibits are respectfully submitted to constitute substantial and convincing evidence of the rental / sales dichotomy understood and universally acknowledged by those familiar with this field, and of the fact that *with respect to the claims under examination*, Forward constitutes non-analogous art. Because Forward is non-analogous art, the rejection of the pending claims under 35 U.S.C. § 103(a) is respectfully submitted to be moot.

Remarks concerning the obviousness rejection

Applicant respectfully requests the Examiner to carefully search the analogous art and to identify the analogous art that is pertinent to the claimed invention. The Examiner's burden is to make out a prima facie case of obviousness using analogous art and this task should not be difficult for the Examiner if indeed the claimed invention is obvious.

Conclusion and request for telephone interview

In view of the above, reconsideration and allowance of this application are now believed to be in order, and such actions are hereby solicited. If any points remain in issue which the Examiner feels may be best resolved through a personal or telephone interview, the Examiner is kindly requested to contact the undersigned at the telephone number listed below.

Applicant herewith petitions the Director of the USPTO to extend the time for reply to the above-identified Office Action for an appropriate length of time, if necessary. Unless a check is attached, any fee due under 37 C.F.R. § 1.17(a) is being paid via the USPTO Electronic Filing System. The USPTO is directed and authorized to charge all required fees, except for the Issue Fee and the Publication Fee, to Deposit Account No. 19-4880. Please also credit any overpayments to said Deposit Account.

Respectfully submitted,

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